

1 HONORABLE ROBERT S. LASNIK
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9 **UNITED STATES DISTRICT COURT**
10 **WESTERN DISTRICT OF WASHINGTON**
11 **AT SEATTLE**

12 JEFF MILLS, individually and on behalf
13 of all others similarly situated,

14 Plaintiff,

15 vs.

16 L & L ENERGY, INC., DICKSON V. LEE,
17 JUNG MEI (ROSEMARY) WANG, and
18 IAN G. ROBINSON,

19 Defendants.

20 No. 11-cv-1423-RSL

21 **MOTION OF ALEKSANDAR
KRSTEVSKI FOR APPOINTMENT OF
LEAD PLAINTIFF AND APPROVAL
OF SELECTION OF LEAD COUNSEL;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

22 Note on Motion Calendar: Nov. 18, 2011

23 Oral Argument Requested

1 Under § 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange Act”),
 2 15 U.S.C. § 78u-4(a)(3)(B), Aleksandar Krstevski, a shareholder of L & L Energy, Inc.
 3 (“LLEN”) and a member of the putative class in this action, moves this Court for an order:

- 4 (1) Appointing Krstevski as Lead Plaintiff;
- 5 (2) Approving Krstevski’s selection of Chapin Fitzgerald Sullivan & Bottini LLP
 as Lead Counsel; and
- 6 (3) Granting such other and further relief as the Court deems just and proper.

7 Krstevski makes this motion based on the grounds that (1) he has suffered a
 8 recoverable loss of approximately \$810.18 in connection with his purchases of 8,449
 9 shares of LLEN stock between August 13, 2009 and August 2, 2011; and (2) he satisfies the
 10 requirements of Federal Rule of Civil Procedure 23 because his claims are typical of the
 11 claims of other class members and because he will fairly and adequately represent the
 12 interests of the class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

13 This motion is based upon the following Memorandum of Points and Authorities,
 14 the accompanying Declaration of Albert Y. Chang and exhibits, all other papers and
 15 proceedings in this action, and such other written or oral argument the Court may consider
 16 in deciding this motion. A proposed order regarding the Lead Plaintiff and Lead Counsel
 17 appointments is attached to this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a securities fraud class action brought on behalf of persons who purchased LLEN stock between August 13, 2009 and August 2, 2011 (the “Class Period”). Aleksandar Krstevski, who suffered a loss as a result of his purchase of 8,449 shares of LLEN common stock during the Class Period, moves to (1) appoint him as Lead Plaintiff; and (2) approve his selection of counsel, Chapin Fitzgerald Sullivan & Bottini LLP, as Lead Counsel.

The Court should apply the three-step process under § 21D(a)(3)(B) of the Exchange Act, as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), and appoint Krstevski as Lead Plaintiff because:

- Krstevski has timely made a motion for lead plaintiff appointment;
 - he is the presumptive lead plaintiff since he has lost approximately \$810.18 as a result of the misrepresentations and omissions alleged in this action and, to the best of his knowledge, he has the largest financial interest in the relief sought by the class; and
 - he meets the typicality and adequacy of representation requirements under Federal Rule of Civil Procedure 23.

See 15 U.S.C. § 78u-4(a)(3).

Furthermore, the Court should approve Krstevski's selection of the law firm of Chapin Fitzgerald Sullivan & Bottini LLP as Lead Counsel because the firm specializes in securities litigation, has a demonstrated record of success in litigating securities class actions, and is thus well qualified to represent the class of LLEN shareholders.

Accordingly, the Court should grant Krstevski's motion in its entirety.¹

¹ The motion does not seek consolidation of related actions because this is the only securities class action pending in this District arising from LLEN's false and misleading statements made during the Class Period. In the event that similar actions are filed in or transferred to this District, the Court should consolidate these actions under Federal Rule of Civil Procedure 42(a) and 15 U.S.C. § 78u-4(a)(3)(B)(ii). *Investors Research Co. v. U.S. Dist. Ct.*, 877 F.2d 777, 777 (9th Cir. 1989) (the "district court has broad discretion . . . to consolidate cases").

1 **II. STATEMENT OF FACTS**

2 According to the complaint dated August 26, 2011, LLEN is a Seattle-based
 3 company that engages in coal mining, clean coal washing, coal cooking, and coal
 4 wholesaling businesses in the People's Republic of China ("PRC"). Compl. ¶ 8. During the
 5 Class Period, LLEN officers issued false and misleading statements about LLEN's business,
 6 operations, and management. *Id.* ¶¶ 17-23. For example, in its Form 10-K filed with the
 7 Securities and Exchange Commission ("SEC") on July 28, 2010, LLEN reported \$109
 8 million in net revenue and \$32.9 million in net income. *Id.* ¶ 22. LLEN also reported only
 9 a single internal control deficiency during the reporting year. *Id.* ¶ 23. As a result of
 10 LLEN's false and misleading public disclosures, LLEN common stock traded at artificially
 11 inflated prices. *See id.* ¶¶ 25, 32.

12 The truth of LLEN's financial condition began to emerge on July 29, 2011, when
 13 LLEN filed an amendment to its 2010 Form 10-K, listing additional internal control
 14 deficiencies. *Id.* ¶ 24. Because of these deficiencies, LLEN admitted that there was a
 15 "reasonable possibility that a material misstatement of [its] annual or interim financial
 16 statements [would] not be prevented or detected on a timely basis." *Id.* On August 2, 2011,
 17 the public also learned that significant discrepancies existed between the revenue and
 18 profit figures LLEN reported to the PRC authorities and those LLEN reported to the SEC.
 19 *Id.* ¶ 26. Other irregularities relating to LLEN's management structure and auditing
 20 process also emerged. *Id.* ¶¶ 28-31. On this news, LLEN stock price declined rapidly. *See*
id. ¶ 32.

22 This action followed, alleging violations of Sections 10(b) and 20(a) of the Exchange
 23 Act. On August 26, 2011, a notice of the pendency of this action was published on Business
 24 Wire. *See* Declaration of Albert Y. Chang ("Chang Decl.") Ex. A.

25 Within 60 days after the publication of this notice, Krstevski moves for lead plaintiff
 26 appointment on October 25, 2011.

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1 **III. ARGUMENT**

2 **A. The Court Should Appoint Krstevski As Lead Plaintiff Because He
3 Is The “Most Adequate Plaintiff”**

4 The PSLRA provides a rebuttable presumption that the most adequate plaintiff in
5 any securities fraud class action is the person that:

- 6 • has either filed the complaint or made a motion in response to a notice;
- 7 • in the determination of the court, has the largest financial interest in the relief
 sought by the class; and
- 8 • otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 Procedure.

9 15 U.S.C. § 78u-4(a)(3)(B)(iii). Here, Krstevski meets each of these three requirements.

10 **1. Krstevski’s Motion Is Timely**

11 Because the Business Wire notice regarding the pendency of this action was
12 published on August 26, 2011, the 60-day period in which class members may move to be
13 appointed lead plaintiff under 15 U.S.C. § 78u-4(a)(3)(A)(II) expires on October 25, 2011.
14 See Chang Decl. Ex. A at 1. Thus, Krstevski’s motion is timely. In addition, Krstevski has
15 retained competent counsel to represent him and the class. See Chang Decl. Ex. D.
16 Krstevski thus satisfies the timeliness requirement of 15 U.S.C. § 78u-4(a)(3)(B).

17 **2. Krstevski Is the Presumptive Lead Plaintiff**

18 The PSLRA requires the Court to appoint a “lead plaintiff” in securities class actions.
19 15 U.S.C. § 78u-4(a)(3)(B)(i). The “lead plaintiff” is “the member or members of the
20 purported plaintiff class that the [C]ourt determines to be most capable of adequately
21 representing the interests of class members.” *Id.* To identify the presumptive “most
22 adequate plaintiff,” the Court must first determine which member or group of members of
23 the class has the largest alleged loss. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb); *see In re*
24 *Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002).

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1 As demonstrated in Krstevski's certification, he purchased 8,449 shares of LLEN
 2 common stock during the Class Period, and retained 999 shares after the end of the Class
 3 Period. See Chang Decl. Ex. B at 2. As a result of these purchases, Krstevski suffered
 4 approximately \$810.18 in damages. Chang Decl. Ex. C. To the best of his knowledge,
 5 Krstevski does not know of another LLEN shareholder who is seeking lead plaintiff
 6 appointment and who has suffered a higher amount of damages. Thus, Krstevski is
 7 qualified to become the presumptive most adequate plaintiff. See *Cavanaugh*, 306 F.3d at
 8 730; see also *Armbruster v. Cellcyte Genetics Corp.*, No. 08-cv-0047-RSL, 2008 U.S. Dist.
 9 LEXIS 96288, at *6 (W.D. Wash. Apr. 28, 2008) (Lasnik, J.) (finding the persons with the
 10 largest loss as the presumptive lead plaintiffs).

11 **3. Krstevski Satisfies the Requirements of Rule 23**

12 The PSLRA requires that lead plaintiffs, in addition to having the largest financial
 13 interest, must "satisf[y] the requirements of Rule 23 of the Federal Rules of Civil
 14 Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). Rule 23(a) requires that: (1) the class
 15 be so numerous that joinder of all members is impracticable; (2) there be questions of law
 16 or fact common to the class; (3) such claims be typical of those of the class; and (4) the
 17 representatives fairly and adequately protect the interests of the class. FED. R. CIV. P.
 18 23(a). In deciding a lead plaintiff motion, courts limit their inquiry to the typicality and
 19 adequacy prongs of Rule 23(a). *Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 666 (C.D. Cal.
 20 2005) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d Cir. 2001)).

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(a) Typicality

The typicality requirement of Rule 23(a)(3) is satisfied when: (1) the class representatives have suffered the same injuries as the absent class members; (2) as a result of the same course of conduct; and (3) their claims are based on the same legal issues. *See Armbruster*, 2008 U.S. Dist. LEXIS 96288, at *7 (finding typicality); *see also In re McDermott Int'l, Inc. Sec. Litig.*, No. 08 Civ. 9943 (DC), 2009 U.S. Dist. LEXIS 21539, at *6 (S.D.N.Y. Mar. 6, 2009) (requiring only a “preliminary showing” of typicality and adequacy of representation). This does not require that the representative claims be substantially identical to absent class members’ claims; it only requires that the claims are reasonably co-extensive with those of absent class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Thus, courts have repeatedly held that typicality is satisfied in securities class actions when the class representative, like all other class members, suffered damages as a result of purchasing the subject stock during the relevant time period at prices that were artificially inflated by defendants’ alleged false and misleading statements. *See, e.g., Armbruster*, 2008 U.S. Dist. LEXIS 96288, at *7.

16 Krstevski's claims are typical of those of other class members. He purchased LLEN
17 stock during the Class Period at prices that were artificially inflated as a result of the
18 misrepresentations and omissions alleged in this action. Like other class members,
19 Krstevski suffered damages from his purchases of LLEN stock. These shared claims satisfy
20 Rule 23(a)(3)'s typicality requirement because they are based on the same legal theory and
21 arise from the same events and course of conduct as the class claims.

(b) Adequacy

23 The adequacy of representation requirement of Rule 23(a)(4) is satisfied when
24 counsel for the class is competent, the representative's interests are not antagonistic to
25 those of the absent class members, and it is unlikely that the action is collusive. Here,
26 Krstevski is an adequate representative of the class for two reasons. First, Krstevski's

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1 interests are clearly aligned with the interests of the members of the class because, like
 2 other class members, he paid artificially inflated prices for LLEN stock due to defendants'
 3 materially false and misleading statements. There is no antagonism between Krstevski's
 4 interests and those of the putative class. *Armbruster*, 2008 U.S. Dist. LEXIS 96288, at *7.
 5 Second, Krstevski has taken significant steps that demonstrate his willingness and ability
 6 to protect the interests of the class: (1) he has executed a sworn certification detailing his
 7 Class Period transactions; (2) he has timely moved this Court for appointment as lead
 8 plaintiff; and (3) he has retained competent and experienced counsel to prosecute these
 9 claims. *See id.* As discussed below, Krstevski's proposed counsel is highly qualified,
 10 experienced, and able to conduct this complex litigation in a professional manner. *See*
 11 Chang Decl. Ex. D. Thus, Krstevski satisfies the typicality and adequacy requirements of
 12 Rule 23 for the purposes of this motion.

13 **B. The Court Should Approve Krstevski's Choice of Counsel**

14 The PSLRA provides that the lead plaintiff shall, subject to court approval, select
 15 and retain lead counsel. 15 U.S.C. § 78u-4(a)(3)(B)(v). A court should not disturb the lead
 16 plaintiff's choice of counsel unless necessary to "protect the interests of the class." 15
 17 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). Krstevski has selected the law firm of Chapin
 18 Fitzgerald Sullivan & Bottini LLP as Lead Counsel. The attorneys at Chapin Fitzgerald
 19 have substantial experience in prosecuting securities class actions. *See* Chang Decl. Ex. D.
 20 Indeed, Mr. Bottini, one of the firm's partners, has been involved in a number of securities
 21 class actions in this District, including *In re Cell Therapeutics, Inc.*, No. 10-cv-0414-MJP
 22 (W.D. Wash.). Mr. Bottini is currently serving as lead counsel for the class in a multi-
 23 billion-dollar action involving a feeder fund to Bernard L. Madoff's Ponzi scheme, *In re*
 24 *Herald, Primeo, and Thema Funds Securities Litigation*, No. 09 Civ. 0289 (RMB)
 25 (S.D.N.Y.). Accordingly, the Court should approve Krstevski's selection of Chapin
 26 Fitzgerald as lead counsel for the class.

1 **IV. CONCLUSION**

2 For the reasons set forth above, the Court should appoint Aleksandar Krstevski as
3 Lead Plaintiff and Chapin Fitzgerald Sullivan & Bottini LLP as Lead Counsel.

4 Dated: October 25, 2011

Respectfully submitted,

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